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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 580

S. B. LAWRENCE, et al., Appellants

vs.

STATE TAX COMMISSION, et al.

SUPPLEMENTAL REFERENCES FOR APPELLANTS

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I.

Since submitting brief in this case, our attention has been directed to an article upon the subject matter written by Joseph H. Beale of the Harvard Law School for the Harvard Law Review in April, 1919, entitled Jurisdiction to Tax. The following language is used:

"VII. EXCISE TAX.

"Not only persons and property may be taxed, but also the privilege of acting within the state, or of taking any benefit from the law of the state. In short, whatever the state may refuse or forbid, it may grant or allow only upon the payment of

a fee to the state in return for the privilege; a license fee, or excise tax. (Nathan v. Louisiana, 8 How. (U. S.), 73 (1850); Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365 (1882); Williams v. Fears, 179 U. S. 270 (1900).

"In People v. Reardon (184 N. Y. 436, 449, 77 N. E. 970. (1906)) the state had laid a transfer tax upon the transfer within the state of shares in a foreign corporation belonging to a non-resident. The power of the state to tax was questioned, on the ground that neither the person nor the property was taxable by the state; the court, however, held the tax valid as a privilege tax. Judge Vann said:

" 'The tax, however is not on property, but on the sale of property, or on a particular kind of contract when made within this state. The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the state, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax which the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property. . . .

" 'Jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the state when the contract is made. . . . Both they and their con-

tract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the state.'

"Jurisdiction to exact a license fee, therefore, depends upon the place where the licensed act is done. Thus a license fee may be exacted from a foreigner for making a sale within the state: (Harrison v. Vicksburg, 3 Sm. & M. (Miss.) 581 (1844); People v. Reardon, 184 N. Y. 431, 77 N. E. 970 (1906), for operating a railroad within the state; (Maine v. Grand Trunk Ry. Co. 142 U. S. 217 (1891) or for using sleeping-cars within the state. (Pullman Southern Car Co. v. Gaines, 3 Tenn. Ch. 587 (1877). So an excise tax may be laid upon the payment of a dividend to a nonresident shareholder, (Oliver v. Washington Mills, 11 Allen (Mass.) 268 (1865)) or upon the receipt of insurance premiums from residents of the state; (Equitable Life Society v. Pennsylvania, 238 U. S. 143 (1915) and such a tax may be laid upon the performance within the state of a contract of sale made in another state. (Shriver v. Pittsburg, 66 Pa. 446 (1870)).

"Though the international jurisdiction of a state to levy an excise tax is complete, its exercise may often be limited by the Constitution of the United States. (See, for instance, Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (1885); Sault Ste. Marie v. International Transit Co., 234

U. S. 333 (1914). A consideration of such limitations is, however, beyond the scope of the present article."

II.

AN EXCISE TAX IN THE FORM OF A TAX UPON NET INCOME MUST NOT INCLUDE INCOME FROM SOURCES BEYOND THE POWER OF THE STATE TO TAX.

In the case of Miller v. City of Milwaukee, 272 U. S. 713, 71 Law Ed. 487, the State of Wisconsin passed an act imposing a net tax upon incomes The tax upon a corporation excluded interest from governmental securities, but a tax was imposed upon the stockholders equal thereto. Mr. Justice Brandeis, in his concurring opinion, at page 716-717, used the following language:

"The tax imposed upon the stockholder results, not from discrimination practiced by a state against the Federal government, but from the fact that the corporation happened to earn its dividend from securities on which, under the Wisconsin law, it was not required to pay a tax. Compare State ex rel. Columbia Constr. Co. v. Tax Commission, 106 Wis. 369, 165 N. W. 382. The operation and effect of the statute would be precisely the same if the dividend had been paid out of any other corporate income exempt from the state tax; from interest upon other tax exempt bonds, if any; or out of income from the part of a business carried on in another state (United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918 E,

748; State ex rel. Arpin v. Eberhardt, 158 Wis. 20, 147 N. W. 1016; Van Dyke v. Milwaukee, 159 Wis. 460, 466, 146, N. W. 812, 150 N. W. 509), or out of rentals or mine royalties received from land without the state, or out of profits received from the sale of property having a situs out of the state (Wisconsin Statutes, Sec. 71.02 (3) (See State ex rel. Mariner v. Hampel, 172 Wis. 67, 178 N. W. 244); or out of dividends received from banks (Wisconsin Statutes, Sec. 71.05 (1) (e))."

The foregoing distinction is observed in all of those cases maintaining the right of a state to impose a franchise tax upon a corporation measured by its net income from all sources including non-taxable investments. The Pacific Company Limited v. Charles G. Johnson, State Treasurer, United States Daily, April 12; McCallum v. Massachusetts, 279 U. S. 620, 73 L. Ed. 874; Flint v. Stone Tracy Co. 220 U. S. 107, 55 Law Ed. 387; Educational Films Corporation v. Ward, 282 U. S. 379, 75 Law Ed. 400.

III.

CONSTRUCTION OF A STATE COURT AS TO THE STATE TAX IS WELL-NIGH CONCLUSIVE.

In the case of Brown-Forman & Company v. Kentucky, 217 U. S. 563; 54 Law Ed. 883, this court affirmed the holding of the Supreme Court of Kentucky that a tax upon a person engaged in compounding, rectifying, adulterating or blending spirits as an excise tax. The court held that

the decision of the Supreme Court of Kentucky, that the tax was not a property tax should be definitely accepted, using the following language:

> "Such a construction and interpretation of the statute here involved by the highest court of the State, should be accepted as definitely determining that the tax complained of is not a property tax but a license tax imposed upon the doing of a particular business, plainly subject to the regulating power of the State."

Respectfully submitted,

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